

DEPARTMENT OF CONSERVATION
STATE MINING AND GEOLOGY BOARD
801 K Street, MS 24-05
Sacramento, California 95814-3528



Robert Grunwald, Chairman
Robert Munro, Vice Chairman
Charles Buckley
Richard Ramirez

TELEPHONE: (916) 322-1082
TDD LINE: (916) 324-2555
FACSIMILE LINE: (916) 445-0738
e-mail: smgb@consrv.ca.gov
web page: www.consrv.ca.gov/smgb

SELECTION OF PROFESSIONAL SERVICE FIRMS

TITLE 14, NATURAL RESOURCES DIVISION 2, DEPARTMENT OF CONSERVATION CHAPTER 8, MINING AND GEOLOGY SUBCHAPTER 1, STATE MINING AND GEOLOGY BOARD ARTICLE 13, SELECTION OF PROFESSIONAL SERVICE FIRMS SECTIONS 3920 THROUGH 3930

NOTICE OF PROPOSED RULEMAKING

NOTICE IS HEREBY GIVEN that the State Mining and Geology Board (SMGB) proposes to add the regulations described below after considering all comments and recommendations regarding the proposed action.

PROPOSED REGULATORY ACTION

The SMGB proposes to add Article 13, §§ 3920 through 3930, to the California Code of Regulations (CCR), Title 14, Division 2, Chapter 8, Subchapter 1. These regulations clarify and make specific the SMGB's procedures for selecting professional service firms.

PUBLIC HEARING AND WRITTEN COMMENT PERIOD

The SMGB has not scheduled a public hearing on this proposed action; however, the SMGB will hold a hearing on June 22, 2000 if it receives a written request for a public hearing from any interested person, or his/her authorized representative, no later than 15 days before the close of the written comment period. The hearing facility will be barrier free in accordance with the Americans with Disabilities Act. At the hearing, any person may present statements or arguments orally or in writing relevant to the proposed action described in the Informative Digest. The SMGB requests, but does not require,

The Mission of the State Mining and Geology Board is to Represent the State's Interest in the Development, Utilization and Conservation of Mineral Resources; Reclamation of Mined Lands; Development of Geologic and Seismic Hazard Information; and to Provide a Forum for Public Redress

that persons who make oral comments at the hearing also submit a written copy of their testimony.

Any interested person may submit written comments relevant to the proposed regulatory action to the SMGB. The Written Comment Period closes at 5:00 P.M. June 19, 2000. The SMGB will consider only relevant comments received at the SMGB office by that time.

AUTHORITY AND REFERENCE

The SMGB is proposing to adopt these regulations that add Article 13, §§ 3920 through 3930, to Title 14, Division 2, Chapter 8 of the CCR pursuant to the authority granted in the Surface Mining and Reclamation Act (SMARA, PRC § 2710 et seq., and specifically PRC § 2755). These regulations clarify and make specific a method by which the SMGB may contract for its work when acting in the capacity of a lead agency pursuant to PRC §§ 2770, 2774.4, 2774.5.

INFORMATIVE DIGEST/PLAIN ENGLISH POLICY STATEMENT OVERVIEW

SMARA was enacted to ensure that any significant adverse impacts of mining to the environment are prevented or mitigated and public health and safety are protected. Under SMARA, surface mining operators are required to submit to their respective lead agencies (cities and counties) for approval, a plan for reclaiming lands disturbed by mining activities, as well as proof of financial assurances to ensure that those disturbed lands are reclaimed in accordance with the approved reclamation plan. Lead agencies are responsible for ensuring their surface mining operators are in compliance with SMARA's permit, reclamation, and financial assurance requirements. The DOC and the SMGB provide lead agency assistance and oversight.

Under the Surface Mining and Reclamation Act of 1975, the State Mining and Geology Board is provided authority to adopt regulations to implement the Act (reference: PRC § 2755 through § 2759). Specifically, PRC § 2758 provides for the SMGB to establish regulations for the orderly evaluation of reclamation plans.

Under PRC § 2770 the SMGB may accept appeals from aggrieved surface mine operators whose reclamation plans or financial assurances have been denied by a city or county, or whose plans have not been acted upon by a city or county within a reasonable time. When the SMGB accepts such appeals, it becomes the lead agency for reviewing and approving those plans and assurances. The SMGB has adopted regulations under Articles 5 and 7 (California Code of Regulations) describing the processes for handling these appeals. In like manner, the SMGB is provided authority under SMARA § 2774.5 to review and approve reclamation plans for cities and counties that do not have surface mining ordinances in accordance with SMARA, or that have no surface mining ordinance at all.

The approval of a reclamation plan is considered a project under the California Environmental Quality Act (CEQA). Therefore, where CEQA has not been addressed or inadequately been addressed by the local lead agency prior to the SMGB accepting a

reclamation plan appeal, the SMGB also becomes the lead agency for the preparation and acceptance of the environmental review. The preparation of an Environmental Impact Report (EIR) often must be accomplished by the SMGB with assistance from a commercial, professional consulting firm under contract to the SMGB.

In instances where the SMGB is the acting SMARA authority for a lead agency without a surface mining ordinance, the SMGB may have to contract for professional services to conduct annual mine inspections, as required by SMARA (§ 2774). At present, the SMGB is the acting lead agency for six local jurisdictions and conducts annual inspections for those jurisdictions.

The Department of General Services has advised the SMGB that, in order for the SMGB to continue to let contracts for professional services in the future, it must adopt regulations in accordance with § 4526 of the Government Code (Selection of professional services firms; adoption of procedures).

ALTERNATIVES STATEMENT

The State Mining and Geology Board must determine that no alternative considered by the SMGB would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action

DISCLOSURES REGARDING THE PROPOSED ACTION

The SMGB staff has made the following preliminary determinations:

- Mandate on local agencies and school districts: The SMGB staff has determined that adoption of these proposed regulations does not impose any new mandates on local agencies or on local school districts.
- Cost or savings to any State agency: No savings or additional expenses to state agencies are identified.
- Cost to any local agency or school district which must be reimbursed in accordance with Government Code §§ 17500 through 17630: The SMGB staff has determined that the adoption of these proposed regulations does not impose any additional cost obligations on local agencies or on local school districts.
- Other non-discretionary cost or savings imposed upon local agencies: No other non-discretionary costs or savings to local agencies have been identified.
- Cost or savings in Federal funding to the State: No costs or savings in Federal funding to the State have been identified.
- Significant adverse economic impact on business including the ability of California businesses to compete with businesses in other states: The SMGB

staff has determined that no adverse impacts to California businesses result from the adoption of this proposed regulatory language. These proposed regulations serve to clarify and make specific existing SMGB authority that is provided for in statute;.

- Potential cost impact on private persons or directly affected businesses: SMGB staff has determined that there is no impact on private persons or businesses; these proposed regulations serve to clarify and make specific existing SMGB procedures that are authorized in statute. These proposed regulations do not mandate actions upon private persons or businesses.
- Creation or elimination of jobs in California: The SMGB staff has determined that the adoption of these regulations will not:
 - Create nor eliminate jobs within California;
 - Create new nor eliminate existing businesses within California;
 - Expand businesses currently doing business in California.
- Significant effect on housing costs: The SMGB staff has determined that the adoption of these regulations will have no significant effect on housing costs.
- Effects on small businesses: The SMGB staff has determined that the adoption of these proposed regulations may affect small businesses. These proposed regulations serve to clarify and make specific existing SMGB procedures that are authorized in statute. These regulations specify that small businesses shall be notified of project proposal announcements and be afforded an opportunity to participate in the proposal process. The express terms of the proposed action written in plain English are available from the agency contact person named in this notice.

AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF REGULATIONS

An interested person may request a copy of the proposed regulations and the Initial Statement of Reasons, or direct questions about the proposed regulations and Initial Statement of Reasons and inspect all supplemental information, upon which the regulations are based, contained in the rulemaking file. The rulemaking file is available for inspection at the SMGB Office at 801 K Street, Room 2436, Sacramento, California, between 9:00 A.M. and 4:00 P.M., Monday through Friday. Copies of the proposed regulations and the Initial Statement of Reasons may be requested by writing to the above address, or viewed on the SMGB's Internet Web Site at:

<http://www.consrv.ca.gov/smgb>

AVAILABILITY OF CHANGED OR MODIFIED TEXT

Following the public comment period, the SMGB may adopt, as final, the proposed regulations substantially as described in this Notice and Informative Digest. Copies of these regulations, as finally adopted, will be sent to all persons on the SMGB's public comment mailing list for this issue and others requesting copies. If, as a result of

public comment, substantive changes to these regulations are deemed appropriate, copies of the proposed changes will be sent to all persons who testified at the public hearing or submitted written comments during the comment period or at the public hearing, and to those who have requested copies of information regarding the regulation.

Thereafter, the SMGB will accept written comments for a period of at least 15 days after the date upon which changes were made available. If adopted, the regulations will appear in CCR, Title 14, Division 2, Chapter 8, Subchapter 1, Article 13, §§ 3920 through 3930.

CONTACT PERSON

Statements, arguments or contentions must be submitted in writing in order for them to be considered by the SMGB. To be included in the mailing list and to receive updates on this rulemaking, please contact the SMGB at (916) 322-1082. Please direct all written comments, procedural inquiries and requests for documents to:

Ms. Kit Gonzales, Executive Assistant
State Mining and Geology Board
801 K Street, MS 24-05
Sacramento, California 95814

INITIAL STATEMENT OF REASONS/PLAIN ENGLISH POLICY STATEMENT

GENERAL PURPOSE AND CONDITION ADDRESSED

This rulemaking amends Title 14, Division 2, Chapter 8, Subchapter 1 of the California Code of Regulations (CCR) by adding Article 13, §§ 3920 through 3930. These regulations clarify and make specific the State Mining and Geology Board's procedures for selecting professional services firms.

The SMGB is authorized by statutes under various Public Resources Codes in the Surface Mining and Reclamation Act of 1975 to conduct appellate hearings concerning reclamation plans and financial assurances, as well as to conduct annual surface mine inspections for local lead agencies when they are not able to do so.

The approval of a reclamation plan is considered a project under the California Environmental Quality Act (CEQA). Therefore, where CEQA has not been addressed or inadequately has been addressed by the local lead agency prior to the SMGB accepting a reclamation plan appeal, the SMGB also becomes the lead agency for the preparation and acceptance of the environmental review. The preparation of an Environmental Impact Report (EIR) often must be accomplished by the SMGB with assistance from a commercial, professional consulting firm under contract to the SMGB.

In instances where the SMGB is the acting SMARA authority for a lead agency without a surface mining ordinance, the SMGB may have to contract for professional services to conduct annual mine inspections, as required by SMARA (§ 2774). At present, the SMGB is the acting lead agency for six local jurisdictions and conducts annual mine inspections for those jurisdictions.

The Department of General Services has advised the SMGB that, in order for the SMGB to continue to let contracts for professional services in the future, it must adopt regulations in accordance with § 4526 of the Government Code (Selection of professional services firms; adoption of procedures).

SPECIFIC PURPOSE

The proposed added regulations §§ 3920 through 3930 are intended to clarify and make specific the SMGB's procedures for selecting professional service firms. These proposed regulations are contained under new Article 13, titled Selection of Professional Service Firms.

CCR § 3920 states the purpose of these proposed regulations is to provide a process of selecting professional services based on demonstrated professional competency and qualifications.

CCR § 3921 sets forth the definitions for terms used in these regulations.

CCR § 3922 establishes the criteria the Board will consider and which will comprise the basis for selection of a professional firm for each project.

CCR § 3923 provides that the Board may estimate the value of the services to be performed prior to the acquisition of a professional firm in order to determine a fair and reasonable compensation for the services.

CCR § 3924 addresses the methods to be used in publishing a request for professional services. This section also provides for the Board to notify small businesses if they qualify for the project.

CCR § 3925 requires the Board to consider at least three firms, provided that three firms respond to the Board's request for services.

CCR § 3926 provides for the Board to conduct contract negotiations with qualifying firms.

CCR § 3927 provides for the Board to amend a contract during the course of the project.

CCR § 3928 provides for the Board to contract for professional services in phases where it is necessary or desirable to have a project performed in phases.

CCR § 3929 provides for the Board to award a contract on a cost-bid basis rather than on the basis of professional qualifications when it is determined that the project is more technical in nature and does not require professional judgments.

CCR § 2930 excludes from these contract requirements services performed by State of California Civil Service employees, services of recognized experts retained as consultants, or to members of advisory boards.

STATEMENT OF NECESSITY

The Department of General Services has advised the SMGB that, in order for the SMGB to continue to let contracts for professional services in the future, it must adopt regulations in accordance with § 4526 of the Government Code (Selection of professional services firms; adoption of procedures).

IDENTIFICATION OF TECHNICAL / THEORETICAL / EMPIRICAL STUDY, REPORTS, OR DOCUMENTS UPON WHICH THE SMGB HAS RELIED

The SMGB has relied upon the Surface Mining and Reclamation Act of 1975 (Public Resources Code §§ 2710 et seq.), and Chapter 1434 of the Statutes of 1974 which added Chapter 10, Division 5 of Title 1 of the Government Code, specifically § 4525 and § 4546.

PROPOSED TEXT

ARTICLE 13 Selection of Professional Service Firms

§ 3920 Selection of Professional Service Firms

(a) The purpose of these regulations is to establish those procedures authorized and required by Chapter 1434 of the Statutes of 1974, which added Chapter 10 (commencing with Section 4525) of Division 5 of Title 1 of the Government Code.

(b) Selection by the board for professional services of private architectural, landscape architectural, engineering, environmental, land surveying, construction management, analytical laboratory, forestry, geological and geological engineering, or geophysical firms shall be on the basis of demonstrated competence and on the professional qualifications necessary for the satisfactory performance of the services required.

NOTE: Authority cited: Public Resources Code Sections 2755-2759; Section 4526, Government Code. Reference: Sections 4525-4529, Government Code.

§ 3921 Definitions, as used in these regulations:

(a) "Small business" firm is one having not more than 15 personnel in the present organization, whether such personnel are professional, technical, clerical or other.

(b) "Architectural, landscape architectural, engineering, environmental, land surveying, construction management, analytical laboratory, forestry, geological and geological engineering, or geophysical services" are those services to be procured outside State of California Civil Service procedures and of a character necessarily rendered by an architect, landscape architect, engineer, environmental specialist, land surveyor, construction management contractor, analytical laboratory, forester, geologist and geological engineer, or geophysicist, but may include ancillary services logically or justifiably performed in connection therewith.

(c) "Project" means a project as defined in Section 10105 of the Public Contract Code, or as defined in the Public Resources Code commencing with Section 21000.

NOTE: Authority cited: Section 4526, Government Code. Reference: Sections 4525-4529, Government Code; Section 10105 Public Contract Code; Section 21000 Public Resources Code.

§3922 Establishment of Criteria

(a) The board shall establish criteria which will comprise the basis for selection for each project. The criteria shall include such factors as professional excellence, demonstrated competence, specialized experience of the firm,

education and experience of key personnel to be assigned, staff capability, workload, ability to meet schedules, nature and quality of completed work, reliability and continuity of the firm, location, and other considerations deemed relevant. Such factors shall be weighted by the board according to the nature of the project, the needs of the State and complexity and special requirements of the specific project.

(b) In no event shall the criteria include practices which might result in unlawful activity including, but not limited to, rebates, kickbacks, or other unlawful consideration. Board members with a relationship to a person or business entity seeking a contract under this section are prohibited from participating in the selection process if the board member would be subject to the prohibition of Section 87100.

NOTE: Authority cited: Section 4526, Government Code. Reference: Sections 4525-4529; Section 87100, Government Code.

§3923 Estimate of Value of Services

Before any discussion with any firm concerning fees, the board may cause an estimate of the value of such services to be prepared. This estimate shall serve as a guide in determining fair and reasonable compensation for the services rendered. Such estimate shall be, and remain, confidential until award of contract or abandonment of any further procedure for the services to which it relates. At any time the board determines the estimates to be unrealistic because of rising costs, special conditions, or for other relevant considerations, the estimate may be reevaluated and modified if necessary.

NOTE: Authority cited: Section 4526, Government Code. Reference: Sections 4525-4529, Government Code.

§3924 Request for Proposals

(a) Where a project requires architectural, landscape architectural, engineering, environmental, land surveying, construction management, analytical laboratory, forestry, geological and geological engineering, or geophysical services, the board shall make an announcement through a publication of the respective professional society, in a construction trade journal or in other appropriate publications, if any exist and are published within a reasonable time frame such that a lengthy publication delay does not adversely affect the project.

(b) The announcement shall contain the following information: The nature of the work, the criteria upon which the award shall be made, and the time within which statements of interest, qualification and performance data will be received.

(c) The board shall endeavor to provide to all small business firms who have indicated an interest in receiving such, a copy of each announcement for projects for which the board concludes that small business firms could be especially qualified. A failure of the board to send a copy of an announcement to any firm shall not operate to preclude any contract.

NOTE: Authority cited: Section 4526, Government Code. Reference: Sections 4525-4529, Government Code

§3925 Selection of firm

After expiration of the period stated in the publications or other public announcements, the board shall evaluate statements of qualifications and performance data which have been submitted to the board. Discussions shall be conducted with no less than three firms regarding the required service. Where three firms cannot be found which could provide the required service, a full explanation including names and addresses of firms and individuals requested to submit proposals must be entered in the files. From the firms with which discussions are held, the board shall select no less than three, provided at least three firms submit proposals, in order of preference, based upon the established criteria, which are deemed to be the most highly qualified to provide the services required.

NOTE: Authority cited: Section 4526, Government Code. Reference: Sections 4525-4529, Government Code.

§3926 Negotiation

The board shall attempt to negotiate a contract with the most highly qualified firm. When the board is unable to negotiate a satisfactory contract with this firm with fair and reasonable compensation provisions, as determined by the procedure set forth in Section 3923 if those procedures were used, negotiations shall be terminated. The board shall then undertake negotiations with the second most qualified firm on the same basis. Failing accord, negotiations shall be terminated. The board shall then undertake negotiations with the third most qualified firm on the same basis. Failing accord, negotiations shall be terminated. Should the board be unable to negotiate a satisfactory contract at fair and reasonable compensation with any of the selected firms, additional firms may be selected in the manner prescribed and the negotiation procedure continued.

NOTE: Authority cited: Section 4526, Government Code. Reference: Sections 4525-4529, Government Code.

§3927 Amendments

In instances where the board effects a necessary change in the project during the course of performance of the contract, the firm's compensation may be adjusted by negotiation of a mutual written agreement in a fair and reasonable amount where the amount of work to be performed by the firm is changed from that which existed previously in the contemplation of the parties.

NOTE: Authority cited: Section 4526, Government Code. Reference: Sections 4525-4529, Government Code.

§3928 Contracting in Phases

Should the board determine that it is necessary or desirable to have a given project performed in phases, it will not be necessary to negotiate the total contract price or compensation provisions in the initial instance, provided that the board shall have determined that the firm is best qualified to perform the whole project at a fair and reasonable cost, and the contract contains provisions that the board, at its option, may utilize the firm for other phases and that the firm will accept a fair and reasonable price for subsequent phases to be later negotiated and reflected in a subsequent written instrument. The procedure with regard to estimates and negotiation shall otherwise be applicable.

NOTE: Authority cited: Section 4526, Government Code. Reference: Sections 4525-4529, Government Code.

§3929 Board's Power to Require Bids

Where the board determines that the services needed are technical in nature and involve little professional judgment and that requiring bids would be in the public interest, a contract shall be awarded on the basis of bids rather than by following the foregoing procedures for requesting proposals and negotiation.

NOTE: Authority cited: Section 4526, Government Code. Reference: Sections 4525-4529, Government Code.

§3930 Exclusions

The provisions of this article shall not apply to service agreements for an architect, landscape architect, engineer, environmental specialist, land surveyor, construction management contractor, analytical laboratory, forester, geologist and geological engineer, or geophysicist, engaged to provide consulting services on specific problems on projects where the architectural, landscape architectural, engineering, environmental, land surveying, construction management, analytical laboratory, forestry, geological and geological engineering, or geophysical work is being performed by State of California Civil Service employees, nor to service agreements for the services of recognized experts retained as consultants or members of advisory boards including the State Mining and Geology Board.

NOTE: Authority cited: Section 4526, Government Code. Reference: Sections 4525-4529, Government Code.